Supreme Court, U.S.
FILED
APR 10 1991
OFFICE OF THE CLERK

No. 90-1576

In The

Supreme Court of the United States

October Term, 1990

CAMPING CONSTRUCTION COMPANY,

Cross-Petitioner,

v.

DISTRICT COUNCIL OF IRON WORKERS OF THE STATE OF CALIFORNIA AND VICINITY, AFL-CIO, an unincorporated association, and IRON WORKERS LOCAL UNION NO. 378, an unincorporated association,

Cross-Respondents.

Cross-Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

CROSS-PETITION FOR WRIT OF CERTIORARI

JOHN W. PRAGER, JR.*
MARK R. THIERMAN
ROBERT FRIED
THIERMAN, COOK, BROWN & PRAGER
601 California Street
17th Floor
San Francisco, CA 94108-2822
(415) 391-9200

Attorneys for Cross-Petitioner Camping Construction Company
* Counsel of Record

April 1991

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. DO THE ANTI-INJUNCTION PROVISIONS OF THE NORRIS-LAGUARDIA ACT APPLY TO REQUESTS MADE TO A FEDERAL COURT TO STAY ARBITRATION PROCEEDINGS PENDING FEDERAL COURT RESOLUTION OF ARBITRABILITY QUESTIONS?

2. SHOULD THIS COURT CREATE AN EXCEPTION TO THE POSSIBLE APPLICABILITY OF THE ANTI-INJUNCTION PROVISIONS OF THE NORRIS-LAGUARDIA ACT FOR ORDERS STAYING ARBITRATION WHEN THE VERY EXISTENCE OF THE COLLECTIVE-BARGAINING AGREEMENT CONTAINING THE AGREEMENT TO ARBITRATE DISPUTES IS AT ISSUE BEFORE THE COURT?

3. DOES THE COURT, RATHER THAN AN ARBITRATOR, HAVE THE OBLIGATION TO DETERMINE WHETHER A COLLECTIVE-BARGAINING AGREEMENT CONTAINING AN ARBITRATION PROVISION HAS BEEN TERMINATED, OR CONTINUES TO EXIST?

LIST OF PARTIES

The parties to the proceedings below, and before this Court are:

1. District Council of Iron Workers of the State of California and Vicinity;
2. Iron Workers Local Union No. 378; and
3. Camping Construction Company.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

OPINIONS BELOW 2

JURISDICTION 3

STATUTES INVOLVED 3

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 6

I. The Ninth Circuit's Holding That The Provisions Of The Norris-LaGuardia Act Are Applicable To Orders Staying Arbitration Raises An Important And Novel Issue Not Previously Decided By This Court 6

II. The Decision Below Is In Direct Conflict With That of Another Court of Appeals As To The Availability Of Injunctive Relief To Stay Arbitration Proceedings 11

III. The Ninth Circuit's Holding That The Question Of The Contract's Termination Or Very Existence Is For The Arbitrator To Decide Is Contrary To This Court's Teachings 15

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

American Bell, Inc. v. Telephone Workers, 736 F.2d 879 (3d Cir. 1984) 12

AT & T Technologies, Inc. v. Communication Workers of America, et al., 475 U.S. 643 (1986) 7, 9, 15, 16, 17

Auto Workers Local 125 v. ITT, 508 F.2d 1309 (8th Cir. 1975) 18

Boys Markets, Inc. v. Retail Clerks Union Local 770, 398 U.S. 235 (1970) 9, 10

Brotherhood of Teamsters, Local 70 v. Interstate Distributor Co., 832 F.2d 507 (9th Cir. 1987)..... 16

Buffalo Forge Company v. United Steelworkers of America, 428 U.S. 397 (1976)..... 8

Crest Tankers Inc. v. NMU, 605 F.Supp. 1270 (E.D.Mo. 1985), *rev'd on other grounds*, 796 F.2d 234 (8th Cir. 1986)..... 12

Diamond Glass Corp. v. Glass Warehouse Workers, etc. Local Union 206, 682 F.2d 301 (2d Cir. 1982) 11, 14

Franklin Elec. v. UAW, 886 F.2d 188 (8th Cir. 1989) 12

George Day Constr. Co., Inc. v. United Brotherhood of Carpenters, Local 354, 722 F.2d 1471, (9th Cir. 1984)..... 12

In re District No. 1 – Pac. Coast Dist. , M.E.B.A. Ass'n, 723 F.2d 70 (D.C. Cir. 1983).....13, 15

John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964) 7, 18

TABLE OF AUTHORITIES – Continued

Page

LAWI/CSA Consolidators, Inc. v. Wholesale etc, Teamsters Local 63, 849 F.2d (9th Cir. 1988)....12, 17

National Railroad Passenger Corporation v. Boston and Maine Corporation, 850 F.2d 756 (D.C. Cir. 1988) 17

Nolde Brothers, Inc. v. Local No. 358, Bakery Workers, 430 U.S. 243 (1977)..... 8, 9, 18

Operating Engineers v. Flair Builders, Inc., 406 U.S 487 (1972)..... 9

Ottley v. Sheepshead Nursing Home, 688 F.2d 883 (2d Cir. 1982) 17

Purex Corp. v. Teamsters Local 618, ___ F.2d ___ (8th Cir. 1983) 18

Rochdale Village, Inc. v. Public Service Employees Union, Local No. 80, 605 F.2d 1290 (2d Cir. 1979) .11, 17

Standard Drywall v. Painters No. 48, ___F.Supp. ___, 111 LRRM 2723 (S.D. Cal. 1982)..... 12

Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960)..... 9

Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957)..... 7, 9

USX Corp. v. Iron Workers Local, ___F.Supp.___, 130 LRRM 3202 (S.D.N.Y. 1988)..... 12

Vic Wertz Distributing Co. v. Teamsters Local 1038, 898 F.2d 1136 (6th Cir. 1990)..... 12

W.R. Grace & Co. v. Local 759, Int'l Union etc. Rubber etc. Workers, 461 U.S. 757 (1983)..... 13

TABLE OF AUTHORITIES – Continued

Page

STATUTES

Labor-Management Relations Act of 1947, as amended, Section 301, 29 U.S.C. §185 ..... 3, 4

National Labor Relations Act, as amended, Section 8(f), 29 U.S.C. §158(f) 3, 4, 18, 19

Norris-LaGuardia Act, 29 U.S.C. §§101-115 ..... *passim*

PERIODICALS AND PUBLICATIONS

F. Elkouri & E. Elkouri, How Arbitration Works, 215 (4th Ed. 1985) 13

No. _____

In The

Supreme Court of the United States

October Term, 1990

CAMPING CONSTRUCTION COMPANY,

Cross-Petitioner,

v.

DISTRICT COUNCIL OF IRON WORKERS OF THE STATE OF CALIFORNIA AND VICINITY, AFL-CIO, an unincorporated association, and IRON WORKERS LOCAL UNION NO. 378, an unincorporated association,

Cross-Respondents.

Cross-Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

CROSS-PETITION FOR WRIT OF CERTIORARI

Camping Construction Company ("Camping"), the Respondent before this Court in Case No. 90-1413, respectfully prays that this Court issue a Writ of Certiorari, pursuant to this Cross-Petition to review a portion of the Judgment and Opinion of the United States Court of Appeals for the Ninth Circuit entered on October 2, 1990.

A Petition for Rehearing, and a Suggestion For Rehearing *En Banc* filed by the District Council of Iron Workers of the State of California and Vicinity and Iron Workers Local Union No. 378 ("Unions"), the Petitioners before this Court in Case No. 90-1413 and Cross-Respondents herein, was denied by the Court of Appeals on December 11, 1990.

OPINIONS BELOW

The Judgment and Opinion of the U.S. Court of Appeals for the Ninth Circuit is reported at 915 F.2d 1333, and appears in the Appendix to the Petition For Writ of Certiorari in Case No. 90-1413 (Pet. App. A, p.1a).

The Order of the U.S. Court of Appeals for the Ninth Circuit denying the Unions' Petition for Rehearing, and rejecting the Unions' Suggestion for Rehearing *En Banc* was not reported, and appears in the Appendix to the Petition For Writ of Certiorari in Case No. 90-1413 (Pet. App. G, p.56a).

The Orders of the U.S. District Court for the Northern District of California in this matter, as well as the Findings of Fact, and Conclusions of Law issued by that Court, were not officially reported. They do, however, appear in the Appendix to the Unions' Petition for Writ of Certiorari in Case No. 90-1413. (Pet. App. B-F, pp.38a-55a).

JURISDICTION

The Judgment and Opinion of the U.S. Court of Appeals for the Ninth Circuit which is sought to be reviewed by this Cross-Petition for Writ of Certiorari was entered on October 2, 1990. The Unions field a timely Petition for Rehearing and a Suggestion for Rehearing, *En Banc*, which was denied by the Court by Order filed December 11, 1990.

The Unions, Petitioners in Case No. 90-1413, have invoked this Court's jurisdiction under 28 U.S.C. § 1254(1), and have timely filed their Petition for Writ of Certiorari within 90 days of the entry of the judgment below. *See*, U.S. Supreme Court Rule 13.1.

The Unions' Petition for Writ of Certiorari in Case No. 90-1413 was received by counsel for Camping on March 11, 1991. This Cross-Petition for Writ of Certiorari is being filed within 30 days of the receipt of that Petition. *See*, U.S. Supreme Court Rule 12.3.

This Court's jurisdiction to review portions of the judgment and opinion of the Court below is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The pertinent statutes involved in this matter are:

1. National Labor Relations Act as amended, Section 8(f), 29 U.S.C. §158(f);

2. Labor-Management Relations Act, of 1947, as amended, Section, 301, 29 U.S.C. §185;

3. The Norris-LaGuardia Act, 29 U.S.C. §§101-115.

In view of the length of the statutes involved, the relevant text of the National Labor Relations Act and the Labor-Management Relations Act, may be found at Pet. App. H, pp.58a-60a; but the relevant text of the Norris-LaGuardia Act is reproduced at Appendix "A" hereto. *See,* U.S. Supreme Court Rules 12.3 and 14.1(f).

STATEMENT OF THE CASE

On July 16, 1987, Camping Construction Company ("Camping") filed a Complaint for Declaratory and Injunctive Relief in the U.S. District Court for the Northern District of California, invoking the jurisdiction of that Court under Section 301 of the Labor-Management Relations Act of 1947, as amended, 29 U.S.C. §185. The Complaint sought the intervention of the District Court in a dispute over whether the conduct of either Camping or the Unions negated the continued existence of a collective-bargaining agreement and the continued vitality of the arbitration provision thereof. Camping contended that if there was no collective-bargaining contract extant between the parties, then *a fortiori* there was no agreement to arbitrate disputes arising out of events occurring subsequent to that contract's demise.

The facts were not in dispute. In 1978, Camping executed a Section 8(f) pre-hire Independent Agreement with the Unions. The Master Labor Agreement to which the Independent Agreement referred contained grievance and arbitration provisions and a termination date of June 30, 1980. The Unions notified Camping of their desire to

modify the agreement on February 21, 1980, thus triggering the termination of the collective-bargaining agreement on June 30, 1980, or so Camping contended. Camping, in reliance upon that position, did not comply with the agreement's provisions after June 30, 1980, and believed that its open and notorious failure to do so was known to the Unions, which began to picket the now non-union Camping at jobsites within their jurisdiction.

Seven years later, however, the Unions sought to invoke the grievance and arbitration provisions of their then current Master Labor Agreement, a collective-bargaining agreement to which Camping had never assented. Grievances filed by the Unions alleging violations of that agreement's provisions were premised upon Camping's failure to have used the Unions' members on Camping's construction projects in 1987. The grievances were scheduled for arbitration before the Board of Adjustment provided for in that Master Labor Agreement.

Since the existence of an agreement to arbitrate disputes is for a court, not an arbitrator, to decide, Camping sought to have the District Court review whether it was bound to arbitrate the asserted grievances of the Unions, and to stay the scheduled arbitration proceedings pending such review.

The District Court, at Camping's request, issued a Preliminary Injunction staying arbitration proceedings pending final disposition of the arbitrability issue before the Court as to whether Camping was bound to a contract calling for arbitration of disputes.

Although the District Court subsequently granted summary judgment for the Unions – concluding that the

question of the collective-bargaining agreement's termination, lawful repudiation, and very existence was for the arbitrator to determine – the U.S. Court of Appeals for the Ninth Circuit partially disagreed. It held (1) the issue as to the "termination" of the agreement was for the arbitrator to decide; (2) the issue as to the lawful repudiation of the Section 8(f) pre-hire collective-bargaining agreement was for the District Court to decide; and (3) the District Court could not issue an order staying arbitration proceedings without full compliance with the provisions of the Norris-LaGuardia Act, 29 U.S.C. §§101-115.

The irony of the Ninth Circuit's holding on these points is that while the "repudiation" issue is pending final resolution by the court, – i.e., while the district court is deciding whether or not a contract containing an arbitration clause even exists – the Unions may proceed unimpaired to arbitrate both the "contract termination" question as well as the merits of the grievances.

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit's Holding That The Provisions Of The Norris-LaGuardia Act Are Applicable To Orders Staying Arbitration Raises An Important And Novel Issue Not Previously Decided By This Court.

"No existing exception to the [Norris-LaGuardia] Act covers the case before us. . . . ", commented the Court below. (Pet. App. p.29a).

The Court has not directly dealt with whether the anti-injunction provisions of Norris-LaGuardia are applicable to orders staying arbitration, orders which are

ancillary to a court's resolution of pending questions as to whether a *duty* to arbitrate exists.

For the reasons set forth below, Camping respectfully suggests that this important question should now be decided by this Court.

This Court, long ago, concluded that the provisions of the Norris-LaGuardia Act did not deprive the federal courts of jurisdiction under Section 301 to issue injunctions – specific performance – compelling arbitration of arbitrable disputes. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957). In deciding that Section 301 and Norris-LaGuardia must be accommodated, the Court recognized that Section 301 jurisdiction necessarily included a federal court's inherent equitable powers – of which the power to *compel or to stay* arbitration are co-equal aspects. *Id.* (Burton, J. concurring). Each requires accommodation of the federal labor policy inherent in cases jurisdictionally-founded upon Section 301 with the policies underlying Norris-LaGuardia's anti-injunction provisions. It is, after all, a function of the judiciary to determine whether the parties to a dispute have agreed to arbitrate it, *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 546-547 (1964), and " . . . unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator." *AT & T Technologies, Inc. v. Communication Workers of America, et al.*, 475 U.S. 643, 649 (1986).

The decision below turns this rule on its head, contemplating that Camping should arbitrate first, and seek the federal court's intervention later on the question of whether there was an agreement to arbitrate in existence. (Pet. App. A. pp.33a-34a)

Here, the arbitration was scheduled to commence on September 24, 1987, over Camping's objections previously voiced to the arbitration board of the lack of an agreement to arbitrate. After a declaratory relief action was commenced to determine whether Camping was still bound to a collective-bargaining agreement calling for the arbitration of disputes, (Pet. App. E., p.51a), the federal court was asked to issue, and subsequently issued, a preliminary injunction in aid of its jurisdiction to finally determine whether Camping was signatory to any agreement under which it would be bound to arbitrate. (Pet. App. D., pp.47a-48a; App. E., pp.49a-54a)

Such a carefully-tailored injunction, limited to preserving the status quo of the parties pending resolution of the legal issues properly before the court on "arbitrability", served rather than frustrated the whole of federal labor policy, including the policy favoring arbitration of labor-management disputes. It is important to note just what such a status quo injunction achieved – it forestalled prosecution, in a possibly unfriendly forum, of a grievance which the Unions may have had *no legal authority* to bring. This was not a sword which frustrated national labor policy by stopping actual concerted activity (See *Buffalo Forge Company v. United Steelworkers of America*, 428 U.S. 397 (1976)), but a shield to preserve the proper balance between the role of the Courts and the role of the arbitrators in labor-management relations when issues concerning whether a party can be compelled to arbitrate after expiration of a collective-bargaining are raised. See, *Nolde Brothers, Inc. v. Local No. 358, Bakery Workers*, 430 U.S. 243 (1977).

Most, if not all, the cases involving "arbitrability" questions – the existence of a contract to arbitrate, or a

duty to arbitrate a particular dispute, – decided by this Court have arisen on petitions to *compel* arbitration by recalcitrant parties. See e.g., *Textile Workers v. Lincoln Mills, supra; Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *Boys Markets, Inc. v. Retail Clerks Union Local 770*, 398 U.S. 235 (1970); *Operating Engineers v. Flair Builders, Inc.*, 406 U.S. 487 (1972); *Nolde Brothers, Inc. v. Bakery Workers, supra; AT & T Technologies, Inc. v. Communication Workers; supra*. This, combined with the understandable reticence of Unions to bring unenforceable and illegal grievances, may help explain why the Court has not heretofore clearly decided this issue. This does not mean, however, that either the logic or the policy of this Court as stated in *Textile Workers v. Lincoln Mills, supra,* is inapplicable when the suit is brought *by* the recalcitrant or victimized party under Section 301 seeking a declaration of its rights, as Camping did here. The inapposite procedural requirements of Norris-LaGuardia simply can have no bearing on such issues, for otherwise the result depends on the fortuitous fact of which party seeks the relief. *Id.*

The provisional remedy of a preliminary injunction to stay a scheduled objected-to arbitration by a party who has also properly invoked the federal court's intervention to determine whether it must arbitrate fosters, rather than hinders, federal labor policy under Section 301. This Court has never concluded that arbitration of "arbitrability" questions is *the* federal labor policy. See, e.g., *AT & T Technologies v. Communication Workers, supra.* On the contrary, the Court has always concluded that the proper fashioning of federal labor policy under Section 301 demands that the courts determine "arbitrability" questions. *Id.* Permitting injunctive relief pending resolution

of those proper judicial questions furthers the goal of stabilizing industrial relations and the *peaceful* settlement of labor-management disputes. Moreover, that a court may find it necessary to preserve the status quo between the parties until it can do so – to stay a scheduled arbitration until it can decide the "arbitrability" question – is simply the reverse use of the equitable jurisdiction of the federal courts previously sanctioned by this Court. See, *Boys Markets, Inc. v. Retail Clerks Union Local 770, supra* at " . . . the unavailability of equitable relief in the arbitration context presents a serious impediment to the congressional policy favoring the *voluntary* establishment of a mechanism for the peaceful resolution of labor disputes. . . . " (emphasis added).

To the extent that this Court has not directly spoken on the propriety of the issuance of injunctions staying arbitration pending resolution of "arbitrability" questions, it should take the opportunity now to do so. The issue raised here is an important one, not only for the Cross-Petitioner, but also for the federal courts who are called upon to determine their jurisdiction and obligations in similar cases, for labor unions as to their rights and duties under collective-bargaining agreements, for employers party to current or expired collective-bargaining agreements who need to forecast their own rights, duties, and possible liabilities, and for arbitrators who need to be able to know what issues are for them to decide and when they may decide them.

Should the Court decline this invitation, Camping as noted earlier, will be confronted with arbitrating at the same time the question of the very existence of the contract to arbitrate is pending in court.

II. The Decision Below Is In Direct Conflict With That Of Another Court of Appeals As To The Availability Of Injunctive Relief To Stay Arbitration Proceedings.

The decision of the Court below is in direct conflict with that of the U.S. Court of Appeals for the Second Circuit in *Diamond Glass Corp. v. Glass Warehouse Workers, etc. Local Union 206*, 682 F.2d 301 (2d Cir. 1982).

The Second Circuit affirmed the judgment of the district court which had enjoined the union from going forward to arbitration. The employer had contended that the collective-bargaining agreement had expired, and the district court was not presented with any evidence to establish that the grievances sought to be arbitrated were linked to provisions of that expired agreement. The district court concluded that there was no agreement to arbitrate such disputes, and enjoined the union from attempting to do so. The Second Circuit concluded likewise, determining that where the arbitrability question involved an expired contract, it was incumbent upon the district court, and a reviewing court, to decide whether the employer had a duty to arbitrate, not simply presume that the grievances should be arbitrated under the expired contract. *Cf., Rochdale Village, Inc. v. Public Service Employees Union, Local No. 80*, 605 F.2d 1290, 1294 (2d Cir. 1979).

That the Second Circuit believed that the federal courts had the authority to enjoin a union from pursuing an arbitration when the union could not first establish the existence of an agreement to arbitrate or even link its grievances to the terms of the expired collective-bargaining agreement is understandable. How else to end the

parties' dispute? Surely that result not only is called for by common-sense, but is *not* clearly contradicted by any decision of this Court, or by any express provision of the Norris-LaGuardia Act.

In similar circumstances, other courts have assumed that injunctive relief to stay arbitration proceedings – to preserve the status quo – is available in the federa[1] courts under Section 301 when arbitrability issues are raised. See, *e.g., American Bell Inc. v. Telephone Workers,* 736 F.2d 879 (3d Cir. 1984); *LAWI/CSA Consolidators, Inc. v. Teamsters, Local 63,* 849 F.2d 1236, 1241, n. 3 (9th Cir. 1988) ("Consolidators was entitled to injunctive relief once it established that it was no longer under a contractual duty to arbitrate"); *Vic Wertz Distributing Co. v. Teamsters Local 1038,* 898 F.2d 1136, 1140 (6th Cir. 1990) ("The issue of arbitrability is typically raised initially in the district court by an action to compel or *stay* arbitration"); *USX Corp. v. Iron Workers Local,* ___ F.Supp. ___, 130 LRRM 3202 (S.D.N.Y. 1988); (stay of arbitration proceedings pending NLRB determination of similar claims); *Crest Tankers Inc. v. NMU,* 605 F.Supp. 1270 (E.D.Mo. 1985) (permanent injunction issued forestalling union claims for arbitration where court determined parties not bound to agreement to arbitrate), *rev'd on other grounds,* 796 F.2d 234 (8th Cir. 1986).

Other courts have politely represented to employers that the proper procedure to invoke when contesting the existence of a contract to arbitrate is to file suit for declaratory and injunctive relief. *E.g., Franklin Elec. v. UAW,* 886 F.2d 188, 191 (8th Cir. 1989); *George Day Constr. Co., Inc. v. United Brotherhood of Carpenters, Local 354,* 722 F.2d 1471, 1476 (9th Cir. 1984); *Standard Drywall v. Painters*

No. 48, ___ F.Supp. ___, 111 LRRM 2723, 2727 (S.D. Cal. 1982); *Cf., W.R. Grace & Co. v. Local 759, Int'l Union, etc. Rubber, etc., Workers*, 461 U.S. 757 (1983) (discussing availability of such relief where conflicting collective-bargaining and Title VII issues are concerned). *See generally*, F. Elkouri & E. Elkouri, *How Arbitration Works*, 215 (4th Ed. 1985).

The Ninth Circuit, however, distinguished its previous *George Day* remarks as *dictum*, and attempted to align itself with the Circuit Court of Appeals for the District of Columbia, which had held in *In re District No. 1 – Pac. Coast Dist., M.E.B.A. Ass'n*, 723 F.2d 70 (D.C. Cir. 1983), that the Norris-LaGuardia Act was applicable to employer-requested stays of scheduled arbitration proceedings. That case, however, was and is not directly applicable to the factual and legal questions posed here.

In *District 1*, the employer sought a stay of arbitration for reasons other than to preserve the status quo pending resolution of questions concerning arbitrability. Indeed, the D.C. Circuit remarked: "In this case, appellees [the employers] did not even claim that the underlying dispute was not arbitrable under the parties' agreement." 723 F.2d 70, at 77. And, in its opinion denying rehearing on this issue, the Court again remarked: "The parties to the disputed collective bargaining agreement in this case have concededly agreed to binding arbitration, and the union has admittedly raised a grievance that is cognizable under the parties' agreement." *Id.* at 81.

In Camping's situation, however, the arbitrability question was and is at issue, and the stay of arbitration was only requested to permit the final resolution of such

by the district court prior to the scheduled arbitration proceedings. The Order granting the injunction here stated in pertinent part:

* * *

> "13. The existence of a contract to arbitrate is properly decided by the courts prior to compulsory submission to arbitration. Plaintiff has established probable success on the merits of its claims.
>
> * * *
>
> In light of the foregoing, it is appropriate, just and proper that, *pending final disposition of this matter before the Court*, the grievance arbitration hearing . . . be stayed pending final disposition of this action." (Pet. App. E. p.53a-54a) (emphasis added)

That the district court here was confronted with the requested use of its traditional equity jurisdiction pending only the resolution of "arbitrability" questions did not demand, as the Ninth Circuit panel below would demand, that the literal provisions of the Norris-LaGuardia Act be observed. Rather, as the Second Circuit in *Diamond Glass* concluded, the use of the injunction to stay or terminate arbitration proceedings is appropriate where the underlying grievance may not be or simply is not arbitrable.

Until this Court exercises its supervisory jurisdiction to decide this issue, two competing rules will exist. One in the Second Circuit which permits such injunctive relief and one in the Ninth Circuit which prohibits such relief absent literal compliance with the provisions of Norris-

LaGuardia. A third rule, based upon the *holding* in *District 1*, to the effect that Norris-LaGuardia otherwise applies to such relief when "arbitrability" is not in issue, will exist in the D.C. Circuit.

The existence of such competing rules, and the importance of the question presented, suggests that this Cross-Petition should be granted.

III. The Ninth Circuit's Holding That The Question Of The Contract's Termination Or Very Existence Is For The Arbitrator To Decide Is Contrary To This Court's Teachings.

The Court's instructive 1986 opinion in *AT & T Technologies Inc., v. Communication Workers, supra,* reaffirmed the principles necessary to determine what questions are for an arbitrator to decide and what questions are for the courts. Insofar as relevant to the issues here, the Court in *AT &T* clearly stated:

> " . . . the question of arbitrability – whether a collective-bargaining agreement creates a duty for the parties to arbitrate the particular grievance – is undeniably an issue for judicial determination. Unless tl e parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator." *Id.* at ___.

The Ninth Circuit failed to heed this teaching, and wrongly concluded that the "arbitrability" question was for the arbitrator to decide; i.e., was there an existing contract between the parties containing an arbitration clause mandating arbitration of the Union's grievances?

In *AT & T*, the parties were bound, as this Court put it, to a "standard" arbitration clause – one under which "*any differences* arising with respect to the *interpretation of this contract* or the *performance of any obligation* hereunder" were to be arbitrated. *Id.*, at 647, and n. 1. (emphasis added) Notwithstanding the apparent breadth of this "standard" arbitration clause, this Court concluded that the arbitrability of the layoffs involved were to be decided by the court, not the arbitrator. *Id.*, at 651.

The Court below, however, used the characterization "broad" (Pet. App. A. p.11a) in describing the arbitration clause at issue here: "Said [arbitration] Board shall have the power to adjust *any differences that may arise regarding the meaning and enforcement of this Agreement.*" (Pet. App. C. p.44a) Having so characterized the scope of the arbitration clause, the Court below concluded on the strength of its own opinion in *Brotherhood of Teamsters, Local 70 v. Interstate Distributor Co.*, 832 F.2d 507 (9th Cir. 1987), that disputes over the continuing existence of the collective-bargaining agreement containing the purported arbitration clause were to be arbitrated.

The Court's reasoning is flawed, however. First, the arbitration clause at issue here is in reality the "standard" one similar to the clause in *AT & T*, not some unusually broad clause. The wording of the clause in *AT & T* and the one here are virtually identical, suggesting that something more than such words as "any" or "all" must be utilized by the parties to establish the clear and unmistakable predicate for an arbitrator's determination of the existence of the contract to arbitrate. Second, as this Court noted in *AT & T*, for arbitrability disputes to be decided by the arbitrator, the parties must have "*clearly*

and unmistakably" said so. *Id.* at 649. Most assuredly, the wording of the arbitration provision here can not support this "clearly and unmistakably" standard. Third, the rule followed by the Court below makes the forum for the resolution of arbitrability questions depend upon a court's semantic characterization of whether the clause is "narrow", "standard", or "broad", rather than upon a court's factual analysis of all relevant evidence. Compare *National Railroad Passenger Corporation v. Boston and Maine Corporation,* 850 F.2d 756 (D.C. Cir. 1988) with *Rochdale Village, Inc. v. Public Service Employees Union, Local No. 80,* 605 F.2d 1290 (2nd Cir. 1979); see also, *Ottley v. Sheepshead Nursing Home,* 688 F.2d 883 (2d Cir. 1982); *LAWI/CSA Consolidators, Inc. v. Wholesale etc, Teamsters Local 63,* 849 F.2d 1236 (9th Cir. 1988).

Fourth, the Court's analysis was erroneously grounded in an assumption made by the Court of Appeals that: "*Usually,* labor arbitration clauses are broad enough to cover disputes over termination." (Pet. App. A p.11a) (emphasis added). The Court of Appeals then attempted to characterize the wording of various types of labor arbitration clauses so as to fit its own view of what constitutes a party's "clear and unmistakable" agreement to submit a termination/duration of contract question to an arbitrator. This pigeonhole technique, when combined with a "presumption" of arbitrability arising from the arbitration clause in the contract which is alleged to have expired by the union's own conduct, ignores the fundamental teachings long ago by this Court and recently reaffirmed in *AT & T*: "The duty to arbitrate being of contractual origin, a compulsory submission to arbitration can not precede *judicial* determination that the collective-bargaining agreement does in fact create such a

duty." *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, at 546-547 (1964). (Emphasis added) See also, *Auto Workers Local 125 v. ITT*, 508 F.2d 1309 (8th Cir. 1975); *Purex Corp. v. Teamsters Local 618*, ___ F.2d ___ (8th Cir. 1983).

No process of legal decision-making occurs in a vacuum. In this instance, the fabric of labor policy comprising construction labor contracts and the arbitration clauses they contain is that determined by Congress in creating Section 8(f) of the National Labor Relations Act. There can be no fundamental conflict between the purposes and policies of Congress's vision of federal labor law as expressed in the NLRA and its parallel statement of intent in enacting Norris-LaGuardia that cannot be harmonized by interpreting Norris-LaGuardia's intention to protect the exercise of concerted activity in light of the limitations of section 8(f) as to *when* that status attaches.

Under these circumstances, it is fundamental that a judicial determination that a collective-bargaining agreement exists between the parties must precede whether the arbitration clause in such alleged agreement was intended by the parties to permit the resolution of the actual grievance dispute at hand. Otherwise, the parties would be required, as here, to arbitrate three arbitrability questions: first, did the parties intend that contract termination or duration issues be arbitrated; second, did the union's notices serve to terminate the contract; and third, if the contract was terminated, did the parties intend that disputes occurring seven years after that termination were to be arbitrated under the expired contract.

The first and third of these three are clearly for the courts, not an arbitrator. *Nolde Brothers, Inc. v. Local 358,*

Bakery Workers, supra. The second is so intertwined with extrinsic legal issues of contract formation and extinction that they should not be subject to a "presumption" of arbitrability. *Id*. at 248 (Stewart, J. and Rehnquist, J., dissenting). Indeed, the decision below would make a thicket out of the intertwining issues by mandating that an arbitrator reach back seven years to decide whether a Section 8(f) pre-hire contract, which may not in any event exist because it has been properly repudiated, was terminated accordingly to its terms. This is precisely the sort of procedural nightmare that caused Congress to broadly fashion the equity jurisdiction of the federal courts.

Because the Ninth Circuit has incorrectly applied the teachings of the Court, Camping respectfully suggests that this Cross-Petition should be granted to determine the proper role of courts and arbitrators when the most fundamental issue – the existence of a contract to arbitrate – is questioned.

CONCLUSION

The issues presented herein raise important, novel and complex questions concerning the jurisdiction of the federal court, the proper role of courts and arbitrators, and the proper interpretation and application of this Court's decisions involving federal labor policy and arbitration. Now is the time to decide them.

For all the foregoing reasons, it is respectfully submitted that this Cross-Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

April 1991

JOHN W. PRAGER, Jr.*
MARK R. THIERMAN
ROBERT FRIED
THIERMAN, COOK, BROWN & PRAGER
601 California Street
17th Floor
San Francisco, CA 94108-2822
(415) 391-9200

Attorneys for Cross-Petitioner Camping Construction Company

*Counsel of Record

APPENDIX A

Norris-LaGuardia Act, 29 U.S.C. §§ 101-115.

§ 101. Limitation on issuance of restraining orders and injunctions

No court of the United States, as herein defined, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this Act, nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this Act.

§ 102. Public policy of United States

In the interpretation of this Act and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are herein defined and limited, the public policy of the United States is hereby declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation

of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of, and limitations upon, the jurisdiction and authority of the courts of the United States are hereby enacted.

§ 103. Nonenforceability of undertakings in conflict with public policy

Any undertaking or promise, such as is described in this section, or any other undertaking or promise in conflict with the public policy declared in section 2 of this Act, is hereby declared to be contrary to the public policy of the United States, shall not be enforceable in any court of the United States and shall not afford any basis for the granting of legal or equitable relief by any such court, including specifically the following:

Every undertaking or promise hereafter made, whether written or oral, express or implied, constituting or contained in any contract or agreement of hiring or employment between any individual, firm, company, association, or corporation, and any employee or prospective employee of the same, whereby

(a) Either party to such contract or agreement undertakes or promises not to join, become, or remain a member of any labor organization or of any employer organization; or

(b) Either party to such contract or agreement undertakes or promises that he will withdraw from an employment relation in the event that he joins, becomes, or remains a member of any labor organization or of any employer organization.

§ 104. Acts not subject to restraining order or injunction

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 3 of this Act;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by

advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 3 of this Act.

§ 105. Combinations or conspiracies

No court of the United States shall have jurisdiction to issue a restraining order or temporary or permanent injunction upon the ground that any of the persons participating or interested in a labor dispute constitute or are engaged in an unlawful combination or conspiracy because of the doing in concert of the acts enumerated in section 4 of this Act.

§ 106. Officer or member of union – Liability for acts of others

No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual

authorization of, such acts, or of ratification of such acts after actual knowledge thereof.

§ 107. Hearing on sworn complaint – Testimony – Findings – Notice – Irreparable injury – Period of restraint – Undertaking

No court of the United States shall have jurisdiction to issue a temporary or permanent injuncture in any case involving or growing out of a labor dispute, as herein defined, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect –

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are

unable or unwilling to furnish adequate protection.

Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also to the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property: Provided, however, That if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.

The undertaking herein mentioned shall be understood to signify an agreement entered into by the complainant and the surety upon which a decree may be rendered in the

same suit or proceeding against said complainant and surety, upon a hearing to assess damages of which hearing complainant and surety shall have reasonable notice, the said complainant and surety submitting themselves to the jurisdiction of the court for that purpose. But nothing herein contained shall deprive any party having a claim or cause of action under or upon such undertaking from electing to pursue his ordinary remedy by suit at law or in equity.

§ 108. Person violating obligation not entitled to relief

No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration.

§ 109. Findings – Specific order

No restraining order or temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of findings of fact made and filed by the court in the record of the case prior to the issuance of such restraining order or injunction; and every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly

included in said findings of fact made and filed by the court as provided herein.

§ 110. Appeal to court of appeals

Whenever any court of the United States shall issue or deny any temporary injunction in a case involving or growing out of a labor dispute, the court shall, upon the request of any party to the proceedings and on his filing the usual bond for costs, forthwith certify as in ordinary cases the record of the case to the court of appeals for its review. Upon the filing of such record in the court of appeals, the appeal shall be heard and the temporary injunctive order affirmed, modified, or set aside with the greatest possible expedition, giving the proceedings precedence over all other matters except older matters of the same character.

§ 113. Definitions – Labor dispute – Participants – Courts included

When used in this Act for the purposes of this Act

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or

more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as hereinafter defined) of "persons participating or interested" therein (as hereinafter defined).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

(d) The term "court of the United States" means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia.

§ 114. Separability

If any provision of this Act or the application thereof to any person or circumstance is held unconstitutional or otherwise invalid, the meaning provisions of the Act and the application of such provisions to other persons or circumstances shall not be affected thereby.

§ 115. General repealing clause.

All Acts and parts of Acts in conflict with the provisions of this Act are hereby repealed.